TABLE OF CONTENTS

	PAGE
Interest of the Amicus	1
Statement of the Case	2
Summary of Argument	3
Argument:	
Point I. The arguments advanced by Appellants sustain the constitutionality of the Act under the principles heretofore established by this Court	4
Point II. Even if the principles relied on by Appellants would not support the Act, the Court should uphold the Act because the State may aid the secular education, considered as a whole, which nonpublic schools provide	5
Point III. The secular education provided by a nonpublic school is separable and identifiable as a whole	6
Point IV. Payments under the Pennsylvania Act are substantially below both the value to the state and the minimum cost to the nonpublic school, of the secular education provided	9
Point V. The Act meets the Court's previously established tests and considerations	10
Point VI. Some apparent assumptions of earlier decisions which require review	12
Conclusion	15
Appendix	1A

TABLE OF AUTHORITIES

PAGE

CASES:

Board of Education v. *Allen*, 392 U. S. 306 (1968) 6, 7, 8, 12

Everson v. *Board of Education*, 330 U. S. 1 (1947) 6

Lemon v. *Kurtzman*, 403 U. S. 602 (1971) 8, 10

Pierce v. *Society of Sisters*, 268 U. S. 510 (1925) . 5, 6, 7

Tilton v. *Richardson*, 403 U. S. 672 (1971) 6

Zorach v. *Clauson*, 343 U. S. 306 (1952) 5

STATUTES:

Act No. 92 of the Pennsylvania General Assembly, August 27, 1971 2

MISCELLANEOUS:

The Fleischmann Report on the Quality, Cost, and Financing of Elementary and Secondary Education in New York State (The Viking Press 1973) 10

Howe, Mark DeWolfe, The Garden and the Wilderness (The University of Chicago Press 1965) 12, 14

BLEED THROUGH POOR COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

Nos. 72-459, 72-620

GRACE SLOAN, as State Treasurer of the Commonwealth of Pennsylvania,

—and—

JOSE DIAZ and ENILDA DIAZ, his wife, WILLIAM ZIMMERSPITZ and NANCY ZIMMERSPITZ, his wife, F. CARL KRETZMANN and KATHERYN L. KRETZMANN, his wife, ARTHUR HARVEY and MURIEL HARVEY, his wife, DANIEL F. X. POWELL and ANNA T. POWELL, his wife, SETH W. WATSON, JR., and ANNE P. WATSON, his wife,

Appellants,

v.

ALTON J. LEMON, NEAL F. BRACKEN, and BENJAMIN S. LOWENSTEIN,

Appellees.

HENRY E. CROUTER,

v.

Appellant,

ALTON J. LEMON, et al.,

Appellees.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF OF NATIONAL ASSOCIATION OF INDEPENDENT SCHOOLS, INC., AMICUS CURIAE

INTEREST OF THE AMICUS

This brief is submitted, with the consent of counsel for all parties, on behalf of the National Association of Inde-

pendent Schools, Inc. ("the Association"), a Massachusetts corporation.

The Association's membership comprises approximately 728 independent schools engaged in primary and secondary education, 28 state and regional school associations, 8 foreign and special purpose associations, 7 associations of administrators and teachers, 4 local school associations, and 4 denominational associations. Fifty-six of these member schools and two state associations are located in Pennsylvania.

Members of the Association include schools which in general terms may be categorized as either: (a) having no direct relationship of any kind with a religious group, some of these including in their programs, however, some religious observance varying in nature and degree from school to school; (b) affiliated with but not supported or controlled by a religious group; or (c) supported or controlled in varying degrees by a religious group. Schools in the latter two categories would be in the minority.

STATEMENT OF THE CASE

The United States District Court for the Eastern District of Pennsylvania has held unconstitutional the Parent Reimbursement Act (Act No. 92 of the Pennsylvania General Assembly, August 27, 1971, hereinafter, the "Act") which provides for a payment by the Commonwealth to parents of children who attended Commonwealth-approved nonpublic schools in order partially to reimburse those parents for the costs incurred in sending their children to nonpublic schools. The Act provides for the payment of the amount actually paid by the parent for tuition, up to a maximum of $75 per elementary school student and $150

BLEED THROUGH POOR COPY

per secondary school student. The Act does not require the parents to use the money received in any particular way.

The Act became effective on August 27, 1971. On September 13, 1971 Appellees filed their complaint herein. Appellants moved to dismiss the complaint but their motion was denied by the District Court by Order filed April 6, 1972. The District Court concluded that the effect of the Act was to advance religion and that it therefore offended the Establishment Clause. The Court, by Order dated July 21, 1972, granted Appellees' motion for summary judgment and enjoined the making of any payments under the Act.

SUMMARY OF ARGUMENT

The major arguments advanced by Appellants are adopted by the Association without being repeated here, and it is believed those arguments fully sustain constitutionality of the Act.

However, if the Court should conclude otherwise, it is urged that the usual tests of constitutionality should properly be broadened to include an acknowledgment that the secular education provided by a religiously oriented nonpublic school is, as has been stated by this Court, "identifiable and separable" from any religious instruction component; that the providing of a substantial secular education by such a school is insured by reason of State requirements and supervision; that the State has a legitimate interest in aiding a parent who provides such a secular education, *considered as a whole,* and may do so by text books or cash, provided that any cash payment, as under the Act, is clearly less than the value, and only a fraction of the cost to the nonpublic school of furnishing the concededly secular education the school provides.

It is further urged that in light of prevailing economic and social conditions, the Act presents no threat of divisive-

ness; history of the Establishment Clause supports aid in the form provided since, among other thing, it affects no religious liberties; and the products of parochial education make it abundantly clear that they do in fact receive a secular education which substantially equals or exceeds that of public schools.

ARGUMENT

I.

THE ARGUMENTS ADVANCED BY APPELLANTS SUSTAIN THE CONSTITUTIONALITY OF THE ACT UNDER THE PRINCIPLES HERETOFORE ESTABLISHED BY THIS COURT.

Because the briefs of Appellants herein have, in the Association's opinion, so ably and thoroughly established the constitutionality of the Act under the principles heretofore enunciated by this Court, the Association has concluded that any further argument in support of the major positions taken by the Appellants could add little to the Court's consideration of the Act.

Nevertheless, and in spite of the Association's conviction that Appellants' presentation should clearly prevail, the Association considers the decision which the Court will make in this case to be so important as to justify a presentation of a variation in constitutional concept, to which the Association feels the Court should logically turn were it for any reason to question the perimeters established under earlier decisions as applied to the Act. The proposal which follows contemplates the Court's adoption of an alternative or supplemental test for determining constitutionality. This proposal is engendered by a determination to reveal all possible avenues open to the Court for sustaining the Act, rather than because of any lack of belief in the avenues which are made manifest by the Appellants in their briefs.

BLEED THROUGH POOR COPY

II.

EVEN IF THE PRINCIPLES RELIED ON BY APPELLANTS WOULD NOT SUPPORT THE ACT, THE COURT SHOULD UPHOLD THE ACT BECAUSE THE STATE MAY AID THE SECULAR EDUCATION, CONSIDERED AS A WHOLE, WHICH NONPUBLIC SCHOOLS PROVIDE.

As stated above, the Association firmly believes that the tests relied on in the Courts' decisions in earlier Establishment cases, as presented by Appellants, fully support the Act. It is the Association's position, however, that even if tests established under such earlier cases did not satisfy the Court as to the constitutionality of the Act, the earlier cases point to and call for adoption by the Court of a supplemental test which should properly be used in determining the Act's constitutionality.

In essence, this supplemental test would demand simply whether the proposed State aid exceeded the value of the secular education, *considered as a whole,* which is provided by the nonpublic school, whether church related or not.

Such a test would acknowledge the right of a parent to have his child receive his State prescribed secular education as a concomitant of religious instruction (*Pierce*)[1]; it would acknowledge that essentially the same concomitancy could be legitimately furthered by the State, at the request of a parent, by making religious instruction a concomitant of a public school education through released time (*Zorach*)[2]. It would acknowledge that a bottle of milk contains just as much milk and cream when homogenized as when the two are separated. The test would also acknowledge the inter-

---

[1]*Pierce* v. *Society of Sisters,* 268 U. S. 510 (1925).
[2]*Zorach* v. *Clauson,* 343 U. S. 306 (1952).

est of and supervision by a State in insuring a sound secular education, and the State's right to provide aid in furtherance thereof.

The only new element would be a recognition that the nonpublic secular education as a whole is more realistically identifiable *as a whole* than by its parts. Thus when the State provides aid in the form of books, even "secular books", it cannot necessarily be sure how the books will be used. But it does know, because of State established and administered standards for all nonpublic schools, that a qualifying school under the Pennsylvania Act will deliver a rounded secular education with the same secular essentials as provided by the public school system. It is this totality of secular education which the State must be allowed to use as the measure and object of its aid. It is this totality which the State can as clearly identify and aid, as it can the separate parts thereof which the Court has sanctioned in *Everson*,[3] *Allen*[4] and *Tilton*.[5] And it is this totality with which the Constitution must be truly concerned, far more than with the shredded parts heretofore categorized with such difficulty by the Court.

III.

THE SECULAR EDUCATION PROVIDED BY A NONPUBLIC SCHOOL IS SEPARABLE AND IDENTIFIABLE AS A WHOLE.

When *Pierce* decided that the Society of Sisters were engaged in an undertaking "long regarded as useful and meritorious" (268 U. S. 510, 534), and that a parent had

---

[3] *Everson* v. *Board of Education*, 330 U. S. 1 (1947).
[4] *Board of Education* v. *Allen*, 392 U. S. 236 (1968).
[5] *Tilton* v. *Richardson*, 403 U. S. 672 (1971).

BLEED THROUGH POOR COPY

a right to choose that form of education for his child, the Court pointed out:

> "The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." 268 U. S. 510, 535

And the Court in *Allen* explains and reaffirms the holding in *Pierce* by stating:

> "A premise of this holding [in *Pierce*] was the view that the State's interest in education would be served sufficiently by reliance on the secular teaching that accompanied religious training in the schools maintained by the Society of Sisters. Since *Pierce,* a substantial body of case law has confirmed the power of the States to insist that attendance at private schools, if it is to satisfy state compulsory-attendance laws, be at institutions which provide minimum hours of instruction, employ teachers of specified training, and cover prescribed subjects of instruction. Indeed, the State's interest in assuring that these standards are being met has been considered a sufficient reason for refusing to accept instruction at home as compliance with compulsory education statutes. These cases were a sensible corollary of *Pierce* v. *Society of Sisters*: if the State must satisfy its interest in secular education through the instrument of private schools, it has a proper in-

> terest in the manner in which those schools perform their secular educational function." 392 U. S. 236, 245-247

The Court adds:

> "Against this background of judgment and experience, unchallenged in the meager record before us in this case, we cannot agree with appellants either that all teaching in a sectarian school is religious or that the processes of secular and religious training are so intertwined that secular textbooks furnished to students by the public are in fact instrumental in the teaching of religion." 392 U. S. 236, 248

The conclusion is clear. There is secular teaching in a religiously oriented school. And it is secular teaching which meets State requirements. This is what makes it possible for the State to provide books in aid of such education without Establishment consequences.

In *Lemon*[6] the Court went on to affirm that the secular education found in the religious school is in fact identifiable as such:

> "The legislatures of Rhode Island and Pennsylvania have concluded that secular and religious education are identifiable and separable. In the abstract we have no quarrel with this conclusion". (613)

Lemon held the statutes there under consideration invalid because of their "excessive entanglement", a holding which in no way conflicts with the views here urged.

Given then an identifiable secular education, one guaranteed by legitimate State requirements and supervision,

---

[6] *Lemon* v. *Kurtzman*, 403 U. S. 602 (1971).

BLEED THROUGH POOR COPY

aid in support thereof, whether by books or cash, furnished to child or parent, presents no Establishment question if, in the case of the cash here involved, it does not exceed the value of the secular education.

IV.

PAYMENTS UNDER THE PENNSYLVANIA ACT ARE SUBSTANTIALLY BELOW BOTH THE VALUE TO THE STATE AND THE MINIMUM COST TO THE NONPUBLIC SCHOOL, OF THE SECULAR EDUCATION PROVIDED.

The legislative finding included in the Pennsylvania Act establishes that "the annual operating cost of educating" the nonpublic school children in the Pennsylvania public schools would be approximately $800 per annum per child. Added capital costs for facilities would be in excess of $1 billion, or $2,000 per pupil. It is therefore beyond the possibility of a doubt that the $75 which under the Act is paid with respect to an elementary school student, and the $150 with respect to a secondary school student, for the State qualifying secular education, is but a small fraction of what that secular education is worth to the State. Thus if the reimbursement is regarded, as it may be, in consideration of what has been provided by the parent, and the sum paid does not exceed market value, there is no Establishment issue, only a business transaction like any other purchase. The market value here would appear to be at least $800.

Even if the payment were not regarded as a purchase, but as some kind of aid, and even if regarded, contrary to our view, as aid to the school rather than to the parent, even so the reimbursement under the Act is but a small fraction of what it must cost the school to provide its State qualifying, secular education. This is apparent from the

fact that in 1969-70 the cost in the State of New York of providing a parochial elementary school education was $194, compared to the $75 paid under the Pennsylvania Act, and the cost of a parochial secondary school education was $435, compared to $175 paid under the Act.[7] Whether or not costs in Pennsylvania would be identical to those in New York, the range is so broad between the amount of reimbursement under the Pennsylvania statute, and the New York parochial schools' costs, as to leave no doubt that the reimbursement under the Pennsylvania Act is a fraction of the cost of the secular education provided no matter how it is measured.

Accordingly, it is clear that the Act, at the most, provides reimbursement which is but a fraction of the fair market value of the secular education provided, as well as being only a fraction of the *cost* of the secular education on which it is based. Whichever approach is used, there is no contribution to an Establishment. The Act is therefore clearly constitutional.

V.

THE ACT MEETS THE COURT'S PREVIOUSLY ESTABLISHED TESTS AND CONSIDERATIONS.

When the secular education provided by a nonpublic school is regarded as a whole, as here urged, the Pennsylvania Act is clearly constitutional.

The lower court did not question the genuineness of the legislative secular purpose any more than this Court questioned such purpose in *Lemon*. Also, it appears beyond question that the administration of the Pennsylvania Act

[7]Vol. 1, The Fleischmann Report on the Quality, Cost, and Financing of Elementary and Secondary Education in New York State, at 395 (The Viking Press 1973).

BLEED THROUGH POOR COPY

involves no entanglement. This appears doubly insured because payment is to the parent after the transaction between the parent and the school has been completed and paid for.

This leaves only the test of whether the Act advances or inhibits religion. It does neither, since, as established above, payment is made only with respect to the secular education package provided by the nonpublic school, and the payment exceeds neither the value nor the cost of that package. Even if the aid were deemed to the school, nothing is left over to advance religion.

This Court has in recent cases referred to the threat of divisiveness which any aid to nonpublic schools, and presumably even to nonpublic school parents, might engender. But to anticipate any possible divisiveness from this Act would be clearly unjustified, for there is no evidence or common experience on which it can be based in the current situation. The best current indications are that economic matters assume preeminence in the public's mind today. Accordingly, when residents of the State of Pennsylvania who are not religiously inclined, understand that they may well be able to avoid additional public school annual operating costs of $400 million a year, and $1 billion in new capital costs, if they will provide the small sum in aid of nonpublic school parents called for under the Act, the most reasonable prediction is that the Act, far from being divisive, would be cheered. Clearly this is what the Legislature thought, and clearly it is what the City of Philadelphia believes, as appears from the *amicus* brief filed on its behalf.

The City's brief makes it apparent that the real divisiveness to be feared would be that resulting from a failure to give legitimate aid to nonpublic school parents, with the inevitable result of the transfer by such parents of their children to the public schools. For this would be against the will and against the conscience of such parents, and they could be expected to seek redress within the public school

system. Thus the City concludes that the transfers, in addition to the prohibitive costs involved for the State, would cause "chaos" in the City's school system.

Thus to rely on history to establish the likelihood of divisiveness under today's conditions can be extremely misleading. Not only is the economic climate today, as stated above, such as to preclude divisiveness from what the Pennsylvania Act provides, but, in addition, public attitudes toward parochial schools are today very different from what they have been. The United States has elected a Catholic President. Parochial schools are ever more staffed by lay teachers, many of different or no faith. All of these factors present a new situation and one which denies the existence of any basis for a prediction of divisiveness.

This Court in its rationale under the *Allen* case, found absence of establishment in part from the fact that books were distributed to all children, those in nonpublic schools as well as those in public. Concededly, under the Pennsylvania statute, reimbursement is provided only as to the nonpublic sector. But this does not serve to distinguish the holding in *Allen*. For certainly the reason the public sector is not included is because it has already been fully provided for. Realistically, on this point, it can be said that this Act is on all fours with *Allen* because it, for the first time, begins to make universal the aid provided for education by adding some aid in the nonpublic sector.

VI.

SOME APPARENT ASSUMPTIONS OF EARLIER DECISIONS WHICH REQUIRE REVIEW.

Historical: Professor Mark DeWolfe Howe's scholarly treatise on the history of the Establishment Clause[8] provides

[8]Howe, Mark DeWolfe, The Garden and the Wilderness (The University of Chicago Press, 1965)

BLEED THROUGH POOR COPY

two highly significant observations as to the difficulties which the Court has faced because of the dual historical genesis of the clause, and the overemphasis which has been placed upon one of its two conflicting objectives:

> "For the prohibition is not only against the enactment of laws respecting an establishment of religion; it is against the making of laws prohibiting its free exercise. The specificity of this second assurance makes it clear beyond controversy that the framers could not have intended the policy of separation, enunciated in the prohibition of establishment, to frustrate or inhibit the religious experience. The Court's endeavor in recent years, accordingly, has been to discover some means by which it may vigorously enforce a Jeffersonian principle of separation while, at the same time, it protects the conscience of the individual. In seeking to have it both ways—to safeguard the conscience of individuals and to prevent aid to religion—the Court's tendency has been to look upon its task as that of blending a secularist's rule of separation, derived from Jefferson, with a believer's rule of freedom, derived from Roger Williams. It has failed sufficiently to recognize, I think, that the rule of separation was no less a postulate of faith than it was an axiom of doubt. If one is to respect the realities of history in formulating rules of constitutional law, it is not as easy as the Court has pretended it to be to cast out the theology of the First Amendment.
>
> * * *
>
> "Yet the Supreme Court, by pretending that the American principle of separation is predominantly Jeffersonian and by purporting to outlaw even *those aids to religion which do not affect religious liberties,* seems to have endorsed a governmental policy aimed

> at the elimination of *de facto* establishments. *The Court too often has allowed itself to become involved in an exercise in scholastic domgatism—a venture in the acrobatics of logic which cannot, for very long, have an important effect on the actualities of American life."* (Emph. added) The Garden and the Wilderness, at 10, 12.

If Prof. Howe's conclusions are justified, there would appear no historical reason for denying the aid which the Act would provide. The Act affects no religious liberties.

Factual: The opponents of nonpublic educational aid have drenched the Court with details of religious control and religious permeation in some parochial schools to a point where antipathy for the religious forms is reflected in some court opinions. Such presentations seem to imply that the product of a parochial education must be some sort of a warped monster, and the parochial educational system —even in its admitted secular aspects—something against which the Establishment Clause must be invoked for protection.

Certainly if parochial education was in some way twisting, subverting, or even denying a sound education to its charges, this might well be a factor which the Court would take into account—consciously or unconsciously—when involved in the blurred area of Establishment. It is perhaps worthwhile, therefore, to call this Court's attention to Prof. Choper's summary (set forth in the appendix) of an exhaustive study which shows, in general, that the products of the Catholic school system fully measure up to both Catholics and nonCatholics who attended public schools, and that they in fact have an edge in some important areas.

Above all, the summary leaves no doubt that parochial schools, as evidenced by their product, do provide a very sound package of general secular education, and one which

BLEED THROUGH POOR COPY

constitutes appropriate subject for state aid where, as in the case of the Act, the aid is so demonstrably in an amount less than the value and cost of the secular education provided so that it can carry no possible realistic support for any kind of establishment.

CONCLUSION

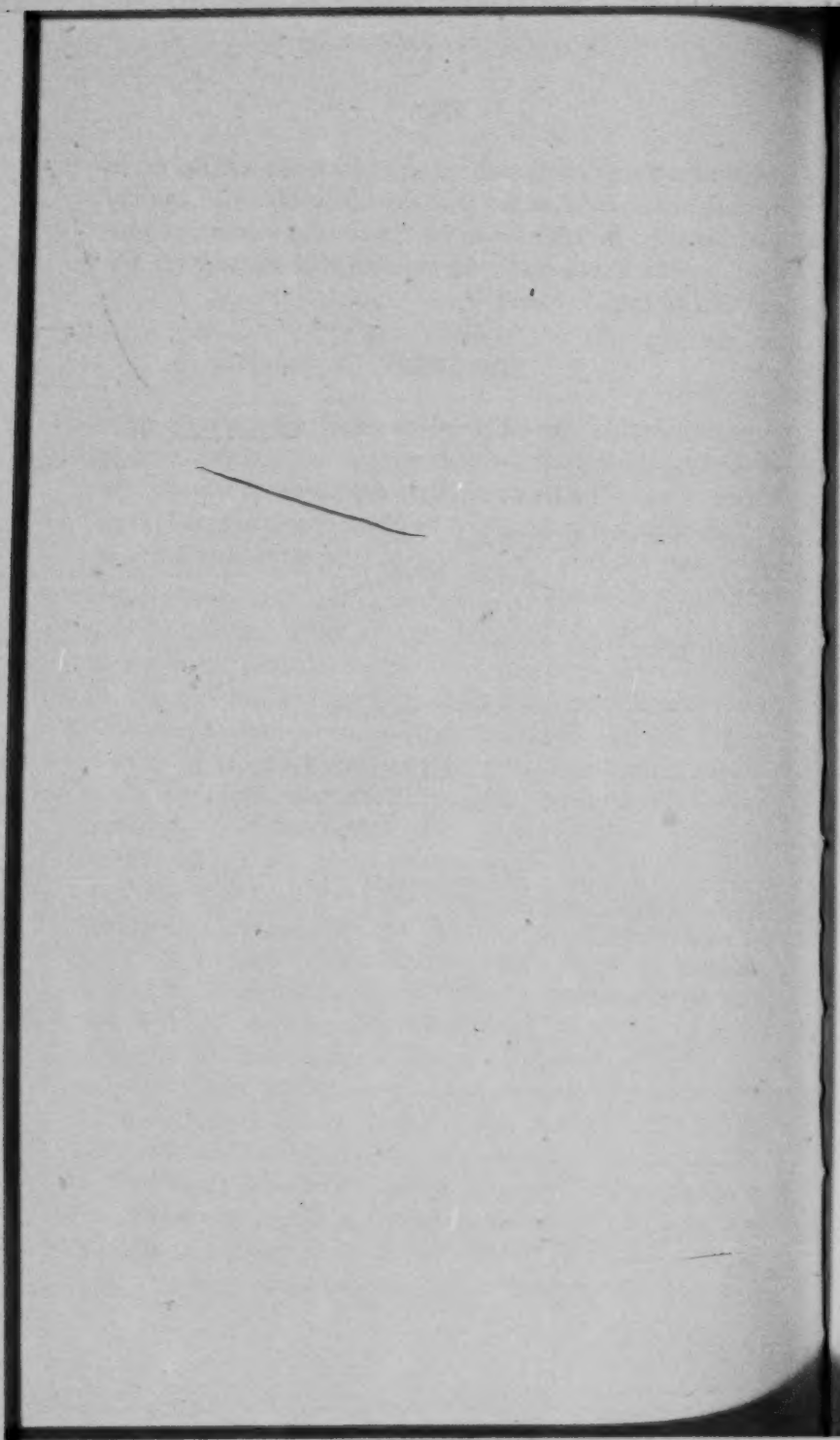
Pennsylvania Act 92 provides reimbursement for part of the cost of the secular education provided by nonpublic schools, and in the case of religiously oriented schools, the secular education guaranteed by State requirements is separable and indentifiable. The Act, therefore, involves no constitutional violation.

Dated: March 20, 1973

Respectfully submitted,

ETHAN A. HITCHCOCK
1 Rockefeller Plaza
New York, N. Y. 10020

WEBSTER SHEFFIELD FLEISCHMANN
HITCHCOCK & BROOKFIELD
1 Rockefeller Plaza
New York, N. Y. 10020
GAIL D. HOLLISTER
Of Counsel



BLEED THROUGH POOR COPY

APPENDIX

J. Choper, Establishment Clause and Aid to Parochial Schools, 56 California Law Review 260 at footnote 223 (1968)

Such a major sociological study, comparing Catholic school Catholics and public school Catholics, entitled The Education of Catholic Americans, by Andrew M. Greeley, a Catholic priest, and Peter H. Rossi, a Protestant, was published in 1966 under the auspices of the National Opinion Research Center.

The monograph lends support to the contention just discussed in text accompanying note 222 *supra*. Among the controlled findings were that Catholic school Catholics increased their social class margin over other Catholics, id. at 57; that those who went to Catholic primary schools were more likely to graduate from high school than other Catholics and were just about as likely to do so as public school Protestants, id. at 49-50; that those who went to Catholic high schools were more likely to go to college than Catholics and almost all classes of Protestants who went to public high schools, id. at 50; that Catholic school Catholics scored significantly higher on a brief general knowledge test than did public school Catholics, id. at 120; that Catholic school Catholics ranked measurably higher on an occupational-prestige index than did public school Catholics, id. at 140. The authors conclude that "there is no evidence that Catholic education interferes with occupational or educational achievement." Id. at 146. Relevant thereto is the judgment of Catholic high school Catholics indicating that their schools are no more "repressive" or "authoritarian" than other schools. "There are no significant differences in the proportions saying they are free to disagree in class, that all students are treated equally, or that they are free to talk to the teacher if they think they

have been treated unfairly. Indeed, in two of the three instances, the slight associations that do exist suggest that Catholic schools may be somewhat *more* liberal in these matters." Id. at 193.

The survey also revealed interesting results as to attitudes. It found no evidence that Catholic school Catholics were less tolerant of members of other groups, id. at 122; were less likely to defend civil liberties, were more given to extremist religious attitudes or to distrusting world and wordly effort, or were more rigid in their child-rearing practices, id. at 125; that, while Catholic school Catholics do interact less with other Americans while in school, this does not continue in later life, id. at 121. Other studies have shown that differences between Catholic and non-Catholic schooling, in respect to such matters as participation in the community, values concerning occupational achievement, or the political goals of American society, are nonexistent. See J. Fichter, Parochial Schools: A Sociological Study 116 (1958); Rossi & Rossi, Some Effects of Parochial School Education in America, 90 Daedalus 300 (1961); Rossi & Rossi, Background and Consequences of Parochial School Education, 27 Harv. Educ. Rev. 195 (1957). See also A. Greeley & P. Rossi, the Education of Catholic Americans 8-9 (1966).

Finally, it must be observed that the Catholic school education did produce religious consequences. Catholic school Catholics were more likely to engage in sacramental activity, id. at 56-57, 71, were more "loyal" to the ecclesiastical system, id. at 60, were better informed on the "fine points" of religious knowledge, id. at 61, and were more orthodox in their moral beliefs, id. at 63. See also Kelley, *"Protestants and Parochial Schools"*, in Federal Aid and Catholic Schools 71, 77 (D. Callahan ed. 1964).

BLEED THROUGH POOR COPY